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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of

MM Docket No. 93-300

STEPHEN O. MEREDITH

)

File No. BPH-920430MD

)

AL HAZELTON

)

File No. BPH-920430ME

For Construction Permit for a
New FM Station on Channel
243C1 in Audubon, Iowa

To: The Honorable John M. Frysiak
Administrative Law Judge

OPPOSITION TO MOTION TO ENLARGE THE ISSUES

Al Hazelton ("Hazelton"), by his attorneys and pursuant to Sections 1.229(d) and 1.294(c) of the Commission's Rules, hereby opposes the Motion to Enlarge the Issues submitted by Stephen O. Meredith ("Meredith"). In support thereof, Hazelton states as follows:

1. Under the provisions of Section 1.229, a movant has a heavy burden in seeking a hearing issue. It has been held that the movant must show the existence of a substantial question of fact warranting exploration in the hearing context. Cornwall Broadcasting Corp., 47 RR 2d 869 (ALJ 1980). No such showing has been made by Meredith and a hearing is therefore not required. See Priscilla L. Schwier, 4 FCC Rcd. 2659, 2660 (1989), aff'd, No. 89-1256 (D.C. Cir. 1990).

3. The issue sought by Meredith is whether Hazelton has engaged in a false certification and misrepresentation in connection with his Form 301 application. In particular, Meredith

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alleges that the application was signed before all material was reviewed by the applicant. These claims are wide of the mark.

4. Meredith's argument is belied by the facts. The facts concerning this matter are detailed in the attached Declarations of Al Hazelton (Exhibit A) and his consulting engineer, Donald L. Markley of the firm of D. L. Markley & Associates, Inc. (Exhibit B). These Declarations show that the certification was not false and nothing was misrepresented to the Commission.

5. As indicated in the Declarations, a completed engineering portion of the application was finished by Mr. Markley on April 27, 1992 and forwarded by overnight mail to the applicant on that day. On April 28, 1992, the applicant had a full and complete copy of the application, including the engineering portions thereof, before him. As indicated by his signature and execution date listed, Mr. Hazelton reviewed and signed the application on April 28, 1992 and forwarded it to counsel in Washington for submission to the Commission.

6. On April 29, 1992, the day prior to the final date for filing applications for the Audubon allotment, a member of the Markley firm discovered an error in the work that had been done. This error, which did not affect the location of the transmitter, the tower's height, or the station's power, was identified to the applicant and counsel and corrections were made to ensure that the Commission's engineering standards, including the "hard look"

standards, were fully met.¹ The corrected engineering was delivered to the applicant and counsel on April 30, 1992 for inclusion in the application being filed with the Commission.

7. It is evident from these facts that no misrepresentation or false certification was made. The applicant did review the application on the date that it was certified. The consulting engineer did correct his exhibit on April 29. No attempt was made to deceive the Commission in any regard.² Moreover, the applicant was fully and completely aware of all elements of his application. In fact, owing to his background as a station engineer, the applicant was more cognizant of the engineering issues, than applicants who have no idea by what is contained in the work their consulting engineer's perform.

8. The cases relied on by Meredith are not to the contrary. In Triangle Broadcasting Co., 49 RR 2d 1601 (A.L.J. 1981), the applicant certified his application when he had no engineering information before him. It is not disputed that Hazelton had an engineering report in his possession and was cognizant of what it

¹ Under the former "hard look" standards, an applicant failing to meet the specified tenderability requirements would have its application return and there would be no opportunity to compete for the allotment. As the Commission has indicated, this caused engineers to be "letter perfect" in their work, and the efforts of the Markley firm in this matter were certainly intended to meet the Commission's high thresholds. Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications, 70 RR 2d 1605 (1992).

² In fact, if Hazelton had wanted to deceive the Commission, he or Markley could have affixed different dates on the application. Instead, Hazelton and Markley affixed the dates on which the events actually occurred.

contained. Likewise, it is not disputed that Hazelton personally reviewed all parts of his application prior to the time it was submitted to the Commission. In Post-Newsweek Stations, Florida, Inc., 34 RR 2d (Rev. Bd. 1975), the applicant did not sign the application on the date stated therein and, when he did sign the application, it was incomplete due to the total absence of a programming statement, and was only fully completed "some time thereafter." Here, of course, the applicant and his engineer did not alter dates in order to portray events that did not occur and when the applicant certified his application, he had a full and complete Form 301 before him.

9. The Commission's decision in Edward W. St. John, 67 RR 2d 774 (1990), points to why there is no need for a hearing issue in this matter. St. John distinguishes the situation where application materials were not in existence, such as in the Post-Newsweek and Triangle cases, from that where the material was in existence, as here. There was an engineering statement in existence at the time it was certified by Mr. Hazelton. While the engineering material was corrected, it was a minor change that did not involve the material provisions of the engineering portion such as location, height of tower, and power. St. John clearly indicates that materiality is an important consideration and the application that Hazelton filed, with corrected and accurate engineering, was not materially different from that which he reviewed on April 28, 1992.

10. The applicant also submits that since the consulting engineer is required to certify Section V-B on page 18, the Commission has recognized that the certification requirement belongs to the engineer and not the applicant. If this were not so, why has the Commission required the consulting engineer's certification. This makes good sense, since what lay applicant has any idea, for example, as to what a radial bearing is, let alone the predicted distance of the radial bearing to the 3.16 mV/m contour? Yet, if the applicant is supposed to review this information and determine if it is correct and certify such correctness, then what applicant isn't falsely certifying the veracity of its application. As the Court of Appeals has noted, where application requirements do not produce the results they apparently seek, they should be reconsidered. See Bechtel v. FCC, No. 92-1378 (D.C. Cir. December 17, 1993).

11. In this matter the engineering information was considered and reconsidered by the applicant and his engineer and the engineer was committed to complying with the terms of the page 18 certification that provides that the work being submitted is "accurate and true to the best of my knowledge and belief." Mr. Markley, knowing of an error in his work, had to correct Section V-B and the accompanying exhibits in order to be accurate and to meet the "hard look" tests. See Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial

FM Broadcast Applications, supra.³ He did so and his work passed the "hard look" review.

12. In sum, there is neither a false certification nor any intent to deceive the Commission in this matter. The dating of documents involves the dates when events actually occurred.⁴ As for certification, it was not false in any regard. There was a full and complete application before the applicant. The only matter is at issue is whether technical elements of the Section V-B, that the consulting engineer certifies to, can be subject to minor corrections, with the knowledge of the applicant. Hazelton submits that this is entirely permissible and mandated by the Commission's "hard look" requirements that an application be correct at the time it is filed.

WHEREFORE, it is respectfully requested that the Motion to

³ The need to avoid any mistakes was noted in FM Application Processing Procedures, supra at 1606-1607, wherein the Commission noted the following statements of commenters:

They say that the 'hard look' made it necessary for legal and engineering counsel who prepare FM applications to add more layers of pre-filing review to avoid even the smallest mistakes.

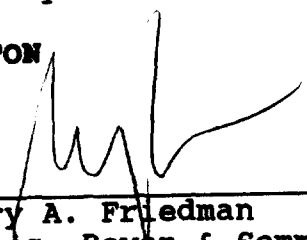
⁴ The irony here is that the applicant had a colorable basis upon which to ask its engineer to date the engineering documentation on April 27, 1992. By not attempting to have any inaccuracies in connection with its application, he is now being faulted. There is no basis for doing so.

Enlarge the Issues filed by Stephen O. Meredith be denied.

Respectfully submitted,

AL HAZELTON

BY:



Barry A. Friedman
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Suite 500
Washington, D.C. 20036
(202) 822-8250

Dated: February 4, 1994

EXHIBIT A

DECLARATION

I, Al Hazelton, do declare, under penalty of perjury, that the following is true and correct:

1. I am the applicant for a new FM radio station at Audubon, Iowa.

2. I have reviewed the Motion to Enlarge Issues filed by Stephen O. Meredith in connection with the Audubon, Iowa FM proceeding. By this Declaration I am responding to the matters raised by Mr. Meredith.

3. I wish to advise the Federal Communications Commission that at the time I signed the Certification for the FCC Form 301 application for Audubon, on April 28, 1992, I based my certification on a complete application, including engineering information.

4. On April 28, 1992, I had a completed FCC Form 301 application before me. This included engineering documentation prepared by my consulting engineer, D. L. Markley & Associates, Inc. On that day, I signed the application and forwarded it to my attorney in Washington, D.C. for submission to the FCC.

5. On April 29 1992, I was informed by Mr. Markley's office that an error had been located in the engineering documentation for the application that the office had previously prepared for me and that the office was in the process of revising the engineering documentation to make certain that the application was both accurate and complete. The changes to the engineering


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documentation were explained to me and I orally approved the changes.

6. In that the application was required to be filed on or before April 30, 1992, I directed the Markley firm to send the revised engineering documentation to my attorney in Washington and authorized him to substitute the new engineering documentation for that which I had provided.

7. Further declarant sayeth not.

Executed at Harlan, Iowa on the 26th day of January, 1994.



Al Hazelton

EXHIBIT B

DECLARATION

I, Donald L. Markley, do declare, under penalty of perjury, that the following is true and correct.

1. I am a professional engineer specializing in communications engineering, including broadcast related matters, and am President of D.L. Markley & Associates, Inc., of Peoria, Illinois, a consulting engineering firm.

2. My firm was retained by Mr. Al Hazelton to prepare the engineering portions of his FCC Form 301 application for a new FM broadcast station in Audubon, Iowa.

3. We completed the Section V-B of FCC Form 301 and this firm's engineering exhibit on April 27, 1992. At Mr. Hazelton's request, we forwarded the documents to Mr. Hazelton in Iowa using overnight mail. I am aware that Mr. Hazelton had these documents before him on April 28, 1992.

4. On April 29, 1992, a member of the engineering staff reviewed the Hazelton application. In doing so, he discovered a potential error in the work we had done. So as to be accurate in our work and comply with the Commission's engineering requirements, including the "hard look" requirement, we felt, in

an abundance of caution, that we should correct the error.

5. The error in our work involved a potential short-spacing issue and a determination of our part that recognition of a potential, minor short-spacing should be contained in the application. There was no change in the location of the transmitter site, the height of the antenna tower, or the transmitter ERP.

6. On April 29, 1992, we completed a revised Section V-B and exhibit. We contacted Mr. Hazelton and his attorney and advised them as to what had occurred. We also went over the correction we needed to make with Mr. Hazelton and fully briefed him as to how the engineering determination would vary from what he had already received and reviewed from us.

7. Mr. Hazelton advised us that he fully understood the change and that we were authorized to make the revisions. In that the application was required to be filed on the next day, we agreed that we would deliver, by overnight mail, revised engineering documentation to Mr. Hazelton and his attorney. This was completed and both Mr. Hazelton and his counsel had this firm's April 29, 1992 engineering documentation on April 30, 1992.

Executed at Peoria, Illinois on the 2nd day of February, 1994.


Donald L. Markley

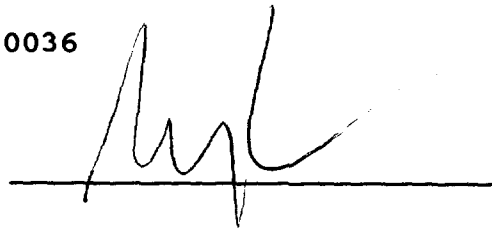
CERTIFICATE OF SERVICE

I, Barry A. Friedman, do hereby certify that I have, on this 4th day of February, 1994, served a copy of the foregoing, "Opposition to Motion to Enlarge Issues," on the following parties by first-class mail, postage prepaid:

Hon. John M. Frysiak *
Administrative Law Judge
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A handwritten signature in dark ink, appearing to read 'Barry A. Friedman', is written over a horizontal line.

* By Hand